STATE OF MICHIGAN

COURT OF APPEALS

CHARLES COMIS, Plaintiff-Appellant,	UNPUBLISHED June 21, 2011
v	No. 297550 Newaygo Circuit Court
JEAN L. STROVEN and KENNETH STROVEN, Defendants-Appellees.	LC No. 09-019398-CH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In this conversion and undue influence case, plaintiff Charles Comis appeals as of right the trial court's February 16, 2010 order dismissing this action without prejudice as a discovery sanction under MCR 2.313(D)(1)(c) and MCR 2.313(B)(2)(c). We reverse and remand for additional proceedings.

Plaintiff sued his daughter Jean L. Stroven, and her husband, Kenneth Stroven, defendants, alleging that prior to his wife Virginia's[1] death, Jean was in a fiduciary relationship with Virginia and violated that relationship by exerting undue influence over Virginia to obtain an interest in certain property. Plaintiff further alleged that Jean unlawfully converted $100,000 from plaintiff's home safes, $250,000 from plaintiff's various bank accounts, $22,500 due to plaintiff following a sale of land in 2005, plaintiff's Public Act 116 checks, plaintiff's tax refunds from 2003-2005, insurance proceeds relating to a pole barn fire, and $5,000 due to plaintiff following the sale of a truck to defendant's daughter in 2004 or 2005. Plaintiff alleged that defendants used these funds to pay their six children's mortgages and purchase automobiles, farm equipment, and horses.

Discovery between the parties was contentious. On August 7, 2009, plaintiff moved the trial court for the entry of an order compelling discovery. Plaintiff claimed that defendants did not respond to his interrogatories and his request to produce documents after being served with both discovery documents. Defendants untimely served plaintiff with their answers to plaintiff's interrogatories on August 10, 2009, and untimely produced documents in response to plaintiff's

[1] Virginia was Jean's mother.

discovery request on August 12, 2009. On August 18, 2009, the trial court held a hearing on plaintiff's motion. On September 1, 2009, the trial court granted plaintiff's motion to compel discovery. On September 3, 2009, plaintiff filed his answers to defendants' interrogatories and request to produce documents. On September 30, 2009, plaintiff again moved for the entry of an order compelling discovery. Plaintiff alleged that defendants' responses to his interrogatories were incomplete and that defendants failed to produce all the requested documents.

On October 5, 2009, defendants filed an answer to plaintiff's motion for the entry of the order compelling discovery. Defendants included a copy of their answers to plaintiff's interrogatories and stated that they had produced all the documents that plaintiff requested that were in their possession. Defendants also moved the trial court for an order compelling discovery. Defendants claimed that plaintiff insufficiently answered their interrogatories and failed to produce documents that they had requested.

On October 12, 2009, the trial court held a hearing with respect to the parties' outstanding motions. The court denied plaintiff's motion to compel discovery, concluding that defendants sufficiently answered plaintiff's interrogatories. The trial court, however, did not rule on defendants' motion to compel discovery, stating that it "didn't realize" that the motion was "up today." Defense counsel stated that he would speak with plaintiff's counsel "and see if he'll answer and I can always renew [my motion] at a later time." Plaintiff's counsel stated, "I have responded to [defense counsel's] letter saying that I will be providing responses additional to those I provided before and I intend to do so." In response, defense counsel stated, "If he does, then I have no problem, your Honor." On November 3, 2009, the trial court entered an order denying plaintiff's motion to compel discovery.

On January 14, 2010, defendants again moved the trial court for an order compelling discovery and also moved to dismiss the case under MCR 2.313(D)(1). Defendants reiterated their contention that plaintiff failed to sufficiently answer their interrogatories. In particular, defendants took issue with plaintiff's answers to interrogatories 19 and 20, which indicated that the amount of money that Jean allegedly converted from plaintiff's safe and bank accounts had yet to be "determined by a forensic accountant." Moreover, defendants stated that plaintiff had not produced information or documentation regarding the transactions defendants conducted with plaintiff's money, which defendants requested in interrogatories 23 through 26.

On January 29, 2010, plaintiff filed an answer to defendants' motion to compel discovery and an answer and brief in opposition to defendants' motion to dismiss. With regards to the money Jean allegedly converted from plaintiff's safes, plaintiff stated that he answered the interrogatory to the best of his knowledge and that he and others would testify to the "estimated amount of cash" that was taken from his safes. With regard to the money that Jean allegedly converted from plaintiff's bank accounts, plaintiff stated that Jean admitted in her deposition that she took money from plaintiff's bank accounts. Plaintiff cited Jean's deposition testimony in which Jean stated the following: that plaintiff and Virginia gave her about $100,000; that she received potentially more than $20,000 (but less than $50,000) from plaintiff and Virginia's bank accounts after Virginia's death, over $10,000 of which was given to plaintiff to purchase a tractor; and that Kenneth did not know of the exchange of this money. In his brief, plaintiff argued that Jean obtained money from a vulnerable adult under MCL 750.174a because she was a "caregiver" and Virginia was a "vulnerable adult" under MCL 750.145m.

On February 2, 2010, the trial court held a hearing on defendants' motions to compel discovery and to dismiss. The court held:

> [T]he Court's satisfied that there's -- And I've read this file thoroughly through again today, and this is the second time we've addressed this issue in discovery.
>
> The Plaintiff has made a number of serious allegations concerning misappropriations of funds, exercise of undue influence and things of this nature, relative to matters of real estate, but there's not one shred of fact in this case which would support any of those allegations.
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> First of all, this matter happened years ago, I think the mother died in 2003, and most of this supposedly took place prior to that, which makes it very difficult.
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> The facts do indicate that the Defendant, Jean Stroven, acted in a fiduciary relationship to her parents or otherwise. Anyway, took care of paying the bills and things of this nature. The reports relative to this undue influence doesn't indicate [sic] that the deceased was under any undue influence at the time she executed the deed prior to her death. The fact of the matter is there isn't.
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> I agree with the Defendant. None of the information necessary to support any of these allegations have been provided through the discovery method, nothing has been, in this Court's opinion, been provided, and for their failure to comply with the discovery orders of the Court and to enter consistent with the Court Rules the Court is going to dismiss the case.
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> * * *
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> Now, now, I'm not dismissing it with prejudice, so when you decide to come up with some evidence to support your bare allegations, the Court will consider it, but at this point in time you haven't done that, Mr. Hanson.

Plaintiff's counsel disagreed with the court's ruling and argued that the court was required to impose the least damaging remedy (an order to compel discovery and an award of costs) where there is a deficiency in discovery. Counsel emphasized that dismissal was "the most excessive" response. In response, the court stated:

> You've had eleven (11) months. You've had eleven (11) months, Mr. Hanson.
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> * * *
>
> I disagree. I've read the transcripts of the depositions that you've included in this thing. The Defendant in this case admitted that she handled the parent's money, but handling the money and showing some misappropriation, some wrongdoing is two different things. There's nothing to support these allegations, even create a factual dispute concerning the allegations that you made in the Complaint.

On February 16, 2010, the trial court entered an order dismissing the case without prejudice under MCR 2.313(D)(1)(c) and MCR 2.313(B)(2)(c).

On March 9, 2010, plaintiff moved the trial court for reconsideration of its order, to which defendants filed an answer. On March 19, 2010, the trial court denied plaintiff's motion for reconsideration "for the reasons set forth in defendants' Answer to plaintiff's motion." Plaintiff now appeals.

Prior to addressing the merits of plaintiff's argument, we address defendants' assertion that the dismissal by the trial court, because it was without prejudice, resulted in no injustice. Defendants assert on appeal that plaintiff has "re-filed a similar Complaint." Plaintiff apparently concedes this, but notes that the case "has been stayed pending the results of this appeal." Because there is a forum in which plaintiff can bring his claims against defendants, we must consider whether the case before us is moot. See *Gen Motors Corp v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (2010), slip op p 16 ("An issue is also moot when a judgment, if entered, cannot have, for any reason, any practical legal effect on the existing controversy."). We conclude that it is not. Plaintiff correctly argues that a statute of limitation may bar claims in the later-filed case. Thus, reinstituting this claim provides plaintiff with relief that would not be otherwise available, meaning that the judgment would have a practical legal effect. Consequently, plaintiff's claims are not moot.

Turning to the merits of plaintiff's claims, we are called to determine whether the trial court erred in dismissing this case as a discovery sanction under MCR 2.313(D)(1)(c) and MCR 2.313(B)(2)(c). We review a trial's court's decision regarding whether to impose discovery sanctions for an abuse of discretion. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 21; 697 NW2d 913 (2005), lv den 475 Mich 851 (2006). A trial court abuses its discretion when it reaches a decision that falls outside the principled range of outcomes. *Herald Co, Inc v E Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). We review de novo questions of law such as the proper interpretation and application of a court rule. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

MCR 2.309 governs interrogatories to the parties. Without leave of the court, a defendant may serve interrogatories on a plaintiff after commencement of the action. MCR 2.309(A)(1). "Each interrogatory must be answered separately and fully in writing under oath. The answers must include such information as is available to the party served or that the party could obtain from his or her employees, agents, representatives, sureties, or indemnitors." MCR 2.309(B)(1). A party submitting interrogatories may move to compel answers under MCR 2.313(A) where the opposing party has objected to or otherwise failed to answer an interrogatory. MCR 2.309(C).

MCR 2.310 governs requests for the production of documents and other things. Without leave of the court, a defendant may serve requests for the production of documents on a plaintiff after the commencement of the action. MCR 2.310(B)(1); MCR 2.310(C)(1). A party submitting a request for production of documents may move to compel discovery under MCR

2.313(A) where the opposing party has objected to or otherwise failed to respond to the request for production of documents. MCR 2.310(C)(3).

Looking first at the trial court's reliance on MCR 2.313(B)(2)(c), we hold that the trial court erred in dismissing plaintiff's complaint under this subrule. MCR 2.313(B) is titled "Failure to Comply With Order" and subsection (2) is applicable only if "a party . . . fails to obey an order to provide or permit discovery." The record is clear that, notwithstanding the trial court's statement to the contrary, the trial court never entered a discovery order with which plaintiff failed to comply. Accordingly, there was no basis for dismissal under MCR 2.313(B).

Assuming that the trial court's reference to MCR 2.313(B) was not an independent basis for dismissal, but a reference to the authority provided under MCR 2.313(D)(1), we still find that the trial court erred. Under MCR 2.313(D)(1), a court may, upon motion, order just sanctions where a party fails "to serve answers or objections to interrogatories" or fails "to serve a written response to a request for inspection" under MCR 2.310. Among other just sanctions, the court "may take an action authorized under subrule (B)(2)(a), (b), and (c)" of MCR 2.313. However, this rule is inapplicable because plaintiff provided answers to the interrogatories; defendants only argued that they were deficient. *Traxler v Ford Motor Co*, 227 Mich App 276, 280, n 2; 576 NW2d 398 (1998).

Because we conclude that the trial court erred in dismissing plaintiff's claim because neither of the rules it cited were applicable, we need not address plaintiff's arguments related to the trial court's failure to consider lesser sanctions. However, in the event that discovery matters continue to be problematic on remand, we note that a trial court should consider, the following nonexhaustive list of factors when determining the appropriate discovery sanction: (1) whether the discovery violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) the prejudice to the defendant; (4) the degree of compliance by the plaintiff with other provisions of the court's order; (6) an attempt by the plaintiff to timely cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). If the trial court believes dismissal to be an appropriate sanction, it "is required to carefully evaluate all available options *on the record* and conclude that the sanction of dismissal is just and proper." *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997) (emphasis added).

Because the trial court erred in dismissing plaintiff's case under MCR 2.313(D)(1)(c) and MCR 2.313(B)(2)(c), we reverse the trial court's dismissal and remand this case to the trial court to reinstate the matter and for other proceedings consistent with this opinion.

Reversed and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens